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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 694

COLGATE-PALMOLIVE-PEET COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, INTERNATIONAL CHEMICAL WORKERS UNION, A.F.L., ET AL., AND WAREHOUSE UNION LOCAL 6, INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION (CIO)

No. 695

WAREHOUSE UNION LOCAL 6, INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION (CIO), PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, COLGATE-PALMOLIVE-PEET COMPANY, AND INTERNATIONAL CHEMICAL WORKERS UNION, A.F.L., ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court below (R. IV, 990-992) is reported in 171 F. 2d 956. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. I, 68-85) are reported in 70 N. L. R. B. 1202.

JURISDICTION

The decree of the court below (R. IV, 993-996) was entered on January 13, 1949. The Company's

petition for rehearing was denied on February 4, 1949 (R. IV, 997). The jurisdiction of this Court is invoked under Section 1254 of 28 U. S. C., and Section 10 (e) and (f) of the National Labor Relations Act, as amended.

QUESTIONS PRESENTED

1. Whether the proviso to Section 8 (3) of the National Labor Relations Act of 1935 justified an employer in discharging employees at the demand of the contracting union pursuant to a closed-shop agreement where, to the employer's knowledge, the contracting union's purpose was to punish employees for engaging in activities on behalf of a rival union, and where the rival union activities were carried on during a period when it was appropriate for the employees to seek a redetermination of representatives.

2. Whether there is substantial evidence to support the Board's finding that the employer knew that the discharge-demands under the closed-shop agreement were made by the contracting union in reprisal against the employees' activities on behalf of a rival union.

3. Whether there is substantial evidence to support the Board's finding that, prior to their discharge, there was no withdrawal from membership in the contracting union by the discharged employees, which would authorize their dismissal under the closed-shop agreement for failure to maintain their membership in the contracting union.

4. Whether the Board abused its discretion in ordering the reinstatement with back pay of discriminatorily discharged employees because of asserted misfeasance by them completely disassociated from the reason for their discharge.

5. Whether, in refusing to give effect to the closed-shop contract and in ordering the reinstatement with back pay of the discharged employees, the Board deprived the employer and the contracting union of property without due process.

6. Whether, in concluding that the Board's findings of fact were supported by substantial evidence, the court below considered the record as a whole, and whether it decided all relevant questions of law.

STATUTES INVOLVED

The pertinent provisions of the National Labor Relations Act (49 Stat. 449, 28 U. S. C. 151, *et seq.*) and of the Labor Management Relations Act of 1947 (61 Stat. 136, 29 U. S. C., Supp. I, 141, *et seq.*) are set forth in the Appendix, *infra*, pp. 35-41.

STATEMENT

I. The Board's Findings of Fact

Upon the usual proceedings under Section 10 of the National Labor Relations Act, the Board, on September 6, 1946, issued its findings of fact, conclusions of law, and order (R. I, 17-85). The pertinent facts, as found by the Board and as

shown by the evidence, may be summarized as follows:

A. The closed-shop agreement between the employer and the C.I.O.

On July 9, 1941, the employer, Colgate-Palmolive-Peet Company, petitioner in No. 694, and Warehouse Union Local 6, International Longshoremen's & Warehousemen's Union (CIO), herein called the C.I.O., petitioner in No. 695, entered into a closed-shop agreement of indefinite duration covering the production and maintenance employees at the Berkeley plant (R. I, 69, 23-24; R. III, 787-788, R. I, 223).[1] On July 24, 1945, a supplemental agreement was entered into which extended the 1941 contract by providing that that contract should "remain in full force and effect" pending the approval or disapproval by the Tenth Regional War Labor Board of certain changes (R. I, 69, 25; R. III, 788-789, R. I, 223).

B. The employees' dissatisfaction with the C.I.O. and the preliminary steps taken by them to change representatives

During the week following the extension of the closed-shop agreement, the five C.I.O. plant stewards arranged to call an open meeting on July 30, 1945, for the employees at large, to discuss a change

[1] References before the semicolon are to the Board's findings as set forth in the Board's decision; references after the semicolon are to the supporting evidence.

in bargaining representatives to be undertaken initially by the formation of a temporary organization known as the Employees Welfare Association (R. I, 26; R. I, 189-191, 208-210, 255). On July 28, 1945, a "notice of meeting" was posted on the bulletin boards throughout the plant inviting "all those interested in joining Employees Welfare Association" to be present at a neighboring meeting hall "at 4:15 p.m., Monday, July 30, 1945" (R. I, 69, 27; R. I, 191-192, 255-256). Employer officials knew of the posting as soon as it occurred and discussed it (R. III, 667-668, R. I, 255-256). Thereafter, one Luchsinger, a steward, and employee Olsen visited Superintendent Altman at his office, and obtained Altman's agreement to shut down the plant for two hours so that the night shift employees could attend the meeting (R. I, 69-70, n. 2; R. I, 268-269). The Board concluded that the employer would not have authorized so important an interruption in the plant's operations without ascertaining the purpose of the meeting (R. I, 69-70, 77).

C. The employer, knowing the C.I.O.'s discriminatory purpose, accedes to the C.I.O.'s request to discharge the stewards and the committeemen for their leadership of the rival union activities

On July 30, 1945, the same day for which the rival organizational meeting was scheduled, the C.I.O. requested and obtained the discharge of the

five C.I.O. stewards who were leading the employees' organizational efforts (R. I, 70, 29; R. III, 806-807, R. II, 654-656). In the early afternoon of that day, four C.I.O. officials, who were not employees of the Company, called upon Superintendent Altman at his office (R. I, 27; R. III, 667). The C.I.O. officials handed Superintendent Altman a letter which requested the discharge of the five duly-elected plant stewards, including Steward Luchsinger who had obtained Altman's agreement to shut down the plant. The letter stated "that charges have been preferred" against these employees "and that they have been suspended from membership" in the C.I.O. "pending a trial". (R. I, 27-28; R. III, 668-669, 784-785, R. I, 259, 256.) After a conference with Vice President Railey, the five stewards were summoned and discharged with the statement that under the terms of the closed-shop agreement the employer was obliged upon demand to terminate their employment until they were restored to good standing by the C.I.O. (R. I, 70, 29; R. I, 194, 256-257, 288-289, R. II, 522, 524, R. III, 669, 670). Each of the stewards was given a letter by the C.I.O. officials (R. I, 29; R. II, 525, 670, R. I, 193). The stewards thereupon left Altman's office (R. I, 29; R. I, 195, R. II, 525, R. III, 670-671). The letters notified the stewards that they were suspended from membership in the C.I.O. pending a union trial upon unspecified charges alleging the violation of the C.I.O.'s Declaration of Principles, Oath of Membership, and Article 9,

Section 1, of C.I.O. Constitution and By-Laws, all of which are platitudinous in nature (R. I, 70; R. III, 847-848, R. I, 229, R. III, 853-856, R. II, 617).

Immediately following the discharge of the five stewards, the C.I.O. representatives distributed throughout the plant a bulletin reading (R. I, 70, 31-32; R. I, 256, R. III, 785, R. I, 259):

ATTENTION

All Warehouse Union Members:
An illegal meeting has been called by certain employees of Peet's now under suspension as members of this union for violation of the membership oath, and other illegal acts.

WARNING

Any member of Local 6 who attends such illegal meeting or participates in violations of our constitution, does so at the risk of losing membership and employment.

Of the 313 production and maintenance employees (R. I, 61, n. 30; R. II, 421-422), more than 200 attended the scheduled anti-C.I.O. meeting (R. I, 70, 32; R. I, 196, 256). It was unanimously resolved to break relations with the C.I.O. and to form an independent union, known as Employees Welfare Association, until affiliation with a strong international union could be accomplished (R. I, 70, 32; R. I, 196, 200-201, 261, 288, R. III, 848, R. I, 259). It was also unanimously agreed that four employees, Thompson, Sherman, Lonnberg,

and Olsen, designated committeemen and elected to act as officers of the interim organization, should seek the reinstatement of the discharged stewards, and that should they fail in their quest, all the employees would in protest cease working (R. I, 70, 33; R. I, 196, 199, R. III, 849, R. I, 259). Upon the close of the meeting the four committeemen dispatched the following telegram to Vice President Railey (R. I, 70-71, 34; R. I, 257, R. III, 786-787, R. I, 259):

> You are hereby notified of action taken by more than 200 employees of Colgate Palmolive Peet Co All being former members of I L W U 1-6 and being more than 50 percent of total employees have withdrawn and severed relations with I L W U-6 as collective bargaining agent.

A telegram of similar purport was sent to the C.I.O. (R. I, 33-34; R. I, 257, R. III, 786, R. I, 259).

On the following morning, July 31, 1945, the four committeemen called upon Vice President Railey at his office, and unsuccessfully urged the reinstatement of the five discharged stewards (R. I, 71; R. I, 257, R. II, 360-361). Railey persisted in his position that under the closed-shop agreement he had no choice but to comply with the C.I.O.'s demand (R. I, 34; R. I, 257). Meanwhile, Superintendent Altman and a group of C.I.O. officials joined the conference where the C.I.O. officials, in the presence of the employer's ranking officials, bluntly informed the four committeemen

that suspension notices for three of them were already in preparation (R. I, 35, 71; R. I, 263-264, R. II, 527), and requested the name of the fourth one, Olsen, so that they could prepare such notice for him. Later that morning the employer received a formal request from the C.I.O. notifying it of the suspension of Thompson, Sherman, Lonnberg, and Olsen from membership in the C.I.O. and requesting their discharge (R. I, 71, 36-37; R. III, 673-675, 846-847).

Also that same morning, C.I.O. representatives circulated another bulletin among the employees at the plant (R. I, 71, 37; R. I, 257). The leaflet warned the employees against aligning themselves with "Sherman-Marshall-Lundeberg & Co.," lest they jeopardize "their own *reputation,* their *union standing,* their *seniority,* and their jobs," and pointedly referred them to "the provisions of the union contract, including the requirement that *only members of Warehouse Union, Local No. 6, ILWU, in good standing* may be employed by the company" (R. I, 71, 37-38; R. III, 789, R. I. 259). Despite this warning, a majority of the employees, upon learning of the refusal to reinstate the five stewards, at noon left the plant in order to hold a second anti-C.I.O. meeting (R. I, 71, 38; R. I, 257). Vice President Railey, who attended the meeting upon invitation, addressed the employees, stating that the reinstatement of the stewards was impossible because of the employer's contractual obligation under the closed-shop agreement (R. I, 72,

38-39; R. I, 257-258, R. II, 529-531). Dissatisfied with Railey's explanation and having failed in their effort to secure the reinstatement of the stewards, the employees in protest voted to reaffirm their resolution not to return to work (R. I, 72, 38-39; R. I, 202, 258, 266, R. III, 850-851, R. I, 259). The strike lasted two and one-half days, and most of the workers participated in it (R. I, 72, 39; R. III, 677, R. II, 533).

Two days later, on August 2, 1945, a third anti-C.I.O. meeting was held, again attended by a substantial majority of the employees, at which it was voted to dissolve Employees Welfare Association, to affiliate with International Chemical Workers Union, A.F.L., herein called the A.F.L., and to return to work the following morning pending an election among the employees to be requested of the National Labor Relations Board (R. I, 72, 40; R. I, 258, R. III, 851-852, R. I, 259). The next morning, all the employees returned to work except the five stewards, who had been previously discharged, and the four committeemen, who had been told the day before by Superintendent Altman that in view of their suspension it would be futile for them to report to work (R. I, 72, 39-40; R. I, 258, 266-268, R. II, 378, R. III, 806-807, R. II, 654-656).

D. The employer, knowing the C.I.O.'s discriminatory purpose, accedes to the C.I.O.'s request to discharge the twenty-eight additional employees for their rival union activities, and refuses to reemploy the stewards and the committeemen

1. Further steps taken to change bargaining representatives and the ensuing campaign

Upon the completion of affiliation with the A.F.L., steps were undertaken by it to secure a change of representatives by resort to formal Board process, by the filing on August 3, 1945, of a petition for the investigation and certification of representatives. The Board held a hearing on this petition on August 22, 1945. (R. I, 72, 73, 41, 45; R. II, 549-552; R. III, 799-805.)[2] In addition, the A.F.L. invoked the Board's processes for the redress of unfair labor practices in order to remedy the dismissal of the stewards and the committeemen by filing, on August 14, 1945, a charge alleging the discriminatory dismissal of the stewards

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[2] Pursuant to the Board's Decision and Direction of Election issued on September 26, 1945, an election was held on October 16, 1945, at which the A.F.L. was defeated 181 to 126 (R. I, 75; R. II, 549-552, R. III, 799-805). Thereafter, upon objections to the election filed by the A.F.L., the election was set aside by the Board because the employer's discharge of employees at the C.I.O.'s request for protected union activities prevented the result of the election from being truly representative of the employees' untrammeled wishes (R. I. 75, 79, 83).

and the committeemen (R. I, 72; R. I, 92-93) The employer admittedly knew of the charge on August 22, 1945 (R. I, 107).

After the election petition was filed by the A.F.L., campaigns for the employees' favor were conducted in the plant by the A.F.L. and the C.I.O. (R. I, 72; R. II, 547). The Company's Labor Relations Director Wood in his daily tours of the plant was handed union literature which was being circulated in profusion throughout the plant, and he observed the A.F.L. buttons which the employees were wearing on their work clothes (R. III, 759-761). This campaign was open, widespread, and intense (R. I, 72, 41; R. I, 299-301, 305-314, 330-332, R. II, 344, 387-388, 391-394, 411-414, 430-431, 433-436, 438-439, 475-478, 481-488, 516, 564, 566, 580-581, 583-584, 592-594, 598, 607, 608-612, 631-632, 642, R. III, 785, 789-790, R. I, 259, R. III, 794-798, 808-847). The C.I.O., in the conduct of its campaign, both orally and through leaflets, made clear that the price of adherence to the A.F.L. was discharge under the closed-shop contract (R. I, 72, 77, 43-44; R. I, 299-300, 305-314, R. II, 438-439, 475, 481-488, 516, 564, 580-581, 592-594, 598, 608-609, 631-632, 642, R. III, 785, 789-790, R. I, 259, R. III, 794-798, R. II, 476-477).

2. The refusal to reemploy the stewards and the committeemen on August 17

On August 17, 1945, the five stewards and the four committeemen reported to work, but their

request for reinstatement was denied (R. I, 73; R. I, 267-268, 289-290, R. II, 341-342, 380-381, 427, R. III, 679-680, 699-700). Labor Relations Director Wood stated that "I fell back on our legal advice" and represented to the discharged employees that under the closed-shop contract the employer was under an absolute duty to abide by the C.I.O.'s wishes (R. I, 73; R. III, 727-728). They were told by Wood that "You will have to remain out until the issue has been determined between you and the C.I.O." (R. I, 73; R. III, 728).

3. The C.I.O. request for the discharge of seventy employees on August 30

On August 30, 1945, a C.I.O. official visited Labor Relations Director Wood at his office and demanded the discharge of an estimated seventy employees, about one-fifth of the working force, upon the asserted ground that they were not members of the C.I.O. in good standing (R. I, 73-74; R. III, 728-731). Wood told him, "Go to hell * * * I [am] * * * not going to act on any such order * * * This thing has gone too far. You are getting too many people involved here. Why, the first thing you know, if this keeps on, we will be shut down * * * I want to talk to [C.I.O. Vice President] Heide about this thing before we get into this thing any deeper" (R. I, 74; R. III, 730). After a discussion with Heide, this particular request was evidently withdrawn (R. I, 74; R. III, 730).

4. The discharge of six employees on August 31

On the morning of August 31, 1945, the C.I.O. requested and obtained the discharge of six employees pursuant to the closed-shop agreement (R. I, 46; R. III, 806-807, R. II, 654-656). The discharges were effected in conjunction with a wholesale inspection of the employees' union dues books.[3] This inspection was conducted by C.I.O. officials in the vicinity of the entrance to the plant during the time when the employees were reporting to work on the morning shift (R. I, 46; R. III, 681-682, 709-716). Superintendent Altman and Assistant Superintendent Carter were present to observe the event (R. III, 681-682, 710-711). Assistant Superintendent Carter saw the C.I.O. officials hand envelopes to some of the employees, and heard them tell these employees that they could not report to work (R. III, 715-716). One employee who received a suspension notice was told, "Here is a letter for you, and you are fired. You cannot work here anymore. * * * You go to your A. F. of L. friends to help you now" (R. II, 516). Another suspended employee who received a notice was told, "take it back to your union, see if they can put you back to work, you are so crazy about them" (R. II, 564).

[3] It was stipulated at the hearing that the C.I.O. did not request the discharge of any of the stewards, the committeemen, or the twenty-eight additional employees because of delinquency in the payment of union dues to the C.I.O. (R. II, 518).

5. The discharge of eighteen employees on September 1

On September 1, 1945, the C.I.O. requested and obtained the discharge of eighteen more employees pursuant to the closed-shop contract (R. I, 74, 46-47; R. III, 806-807, R. II, 654-656). On that day, the C.I.O. delivered a letter to the employer stating that these eighteen employees had been suspended from membership in the C.I.O. and requesting their discharge (R. I, 46-47; R. III, 792, R. I, 315, R. III, 684, R. II, 534). After a conference among the employer's officials, it was decided to call the designated employees into Vice President Railey's office to inform them that their employment was terminated (R. I, 47; R. III, 732-734, R. I, 313-316, R. II, 534-535, 567-568, 572-573, 620-621). The eighteen were called in and Labor Relations Director Wood reiterated to the assembled employees the managment's position that it was under an absolute duty under its closed-shop contract to discharge them upon demand of the C.I.O. (R. I, 47; R. II, 735). A turbulent session ensued, during which employee Norris, whose discharge was requested, expressed her conviction that the employees were dismissed because "we wore A. F. of L. buttons and we distributed literature," to which Wood replied, "I guess it is so, that could be it" (R. II, 488). She further testified that Wood stated, "We talked too much, that if we had kept our mouths shut we wouldn't have got into this mess" (R. II, 488-489). Another

employee testified that Wood said, "If you had kept this quiet about the AFL this wouldn't have happened to you" (R. I, 316). A third employee testified that Wood said, "If we [the discharged employees] didn't wear the AFL buttons and didn't talk too much, why, we wouldn't get in this trouble in the first place" (R. II, 577). One of the assembled employees complained, "I don't see why we can't change from one union to another" (R. II, 492).

6. The discharge of four employees on September 5, 7, and 11

Several days later, on September 5, 7, and 11, 1945, four additional employees were dismissed pursuant to the closed-shop contract under similar retaliatory circumstances (R. I, 50 and n. 20, 51-52; R. III, 806-807, R. II, 654-656, 630-635, 641-646).

E. THE C.I.O.'S SUBSEQUENT TRIAL OF THE DISCHARGED EMPLOYEES

Subsequent to their discharge, the five stewards, the four committeemen, and the twenty-eight additional employees were tried before C.I.O. tribunals. On October 3, 1945, the C.I.O. tried the five stewards and the four committeemen *in absentia*, and on October 10, 1945, a decision of the trial committee was issued recommending their expulsion from the C.I.O. (R. I, 52-53; R. III, 856-866, 877-922). On December 17, 1945, the twenty-

eight additional employees, with one exception, were tried by a C.I.O. tribunal (R. I, 52; R. III, 923-987). Some of these employees protested what they believed to be the irregularity of the proceeding, and forthwith withdrew from further participation in it (R. III, 924, 930-935). The remaining employees participated in the proceeding and during its course entered a so-called "guilty" plea admitting that they engaged in the two and a half days' work stoppage (R. II, 506-507, R. III, 969-976). On December 24, 1945, a decision of the trial committee was issued recommending that the employees who withdrew from the proceeding be expelled and that the employees who pleaded "guilty" be placed on probationary status (R. I, 53-54; R. III, 867-876).

II. The Conclusions and Order of the Board

On the basis of the foregoing facts, the Board determined that "It is clear from the record, and we find, that the [employer] *knew* of the C.I.O.'s reason for demanding the discharges" (R. I, 76), namely, "that the C.I.O. demanded such action because of the complainants' exercise of the right guaranteed employees in the Act to bargain collectively through representatives 'of their own choosing' " (R. I, 76).

The Board, accordingly, concluded that the employer "Thereby violated Section 8 (1) and (3) of the Act, for the reasons stated in the *Rutland Court* case" (R. I, 76). In *Matter of Rutland Court*

Owners,[4] the Board had held that an employer cannot properly discharge employees pursuant to the closed-shop provisions of a contract when, to his knowledge, the discharge is requested by the union which is a party to the contract for the purpose of eliminating employees who have sought to change bargaining representatives at a period when it is appropriate for the employees to seek a redetermination of representatives. By this principle the Board has sought to prevent a closed-shop agreement from being converted into a device to accomplish the permanent suppression of the employees' will in the matter of choice of representatives. In the *Rutland Court* case the Board, by adopting this principle, attempted to work out an accommodation between the sometimes conflicting interest of the free choice of representatives by employees, on the one hand, and of union security and stability of the bargaining relationship, on the other.

The Board's order required the employer to cease and desist from encouraging or discouraging membership in the A.F.L., the C.I.O., or any other labor organization of its employees by discharging or refusing to reinstate any of its employees, or by discriminating in any other manner in regard to their hire, tenure, or other terms of employment (R. I, 80). Affirmatively, the Board's order required the employer to offer reinstatement with

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[4] 44 N. L. R. B. 587, 46 N. L. R. B. 1040.

back pay to the thirty-seven employees, and to post an appropriate notice (R. I, 81-82).

III. Proceedings in the Court Below

On December 30, 1946, the employer filed in the court below a petition to review and set aside the Board's order (R. I, 101-126). The Board, in its answer, requested enforcement of its order (R. I, 134-142). The C.I.O., A.F.L., and named individuals, whom the Board's order required the employer to reinstate with back pay, were permitted by order of the court below to intervene in the proceeding (R. I, 143-144). On January 13, 1949, the court handed down its opinion (R. IV, 990-992), and entered its decree enforcing the Board's order (R. IV, 993-996).

Argument

The decision below presents one question of law as to which there is a conflict of decisions among the circuits, namely: whether the Board properly construed Section 8 (3) of the National Labor Relations Act, before its amendment, as precluding an employer from discharging employees pursuant to a closed-shop agreement, when the contracting union, to the employer's knowledge, has demanded the discharge for the purpose of punishing employees for engaging in activities on behalf of a rival union at a time when it is appropriate for the employees to seek a redetermination of bargaining representatives. The question thus

phrased summarizes the import of the first five questions in No. 694 (Pet., 21-23).[5] On this question, we set forth the considerations which will assist the Court in determining whether certiorari should or should not be granted. The remaining questions which are raised in Nos. 694 and 695 present no issues warranting review by this Court.

1. Prior to the amendments to the National Labor Relations Act in 1947, the question respecting the power of an employer, under Section 8 (3) of the National Labor Relations Act, to discharge employees under a closed-shop agreement although he knows the request for the discharge was motivated by a desire of the contracting union to bar a rival union movement at a time when a change of representatives is proper, was deemed of sufficient importance to warrant the grant of certiorari by this Court. *Local No. 2880* v. *National Labor Relations Board,* 158 F. 2d 365 (C. A. 9), certiorari granted, 331 U. S. 798, certiorari dismissed on motion of petitioner, 332 U. S. 845. That case however, was never decided by the Court on the merits because after the amendment of the Act the writ was dismissed on motion of the petitioner. The decision below is based on the *Local 2880* case (R. IV, 992). It accords with the decisions of the Court of Appeals for the Second Cir-

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[5] Petitioner in No. 695 does not present this question (Pet. 8-9, 11-12).

cuit on this question,* but it is in square conflict with the decision of the Court of Appeals for the Seventh Circuit in *Lewis Meier & Co.* v. *National Labor Relations Board*, 21 L. R. R. M. 2093 (C. A. 7, November 3, 1947), decided "on the authority of *Aluminum Company of America* v. *National Labor Relations Board* (1946), 159 F. 2d 523 [C. A. 7]."

The 1947 amendment of Section 8 (3) of the National Labor Relations Act by Title I of the Labor Management Relations Act constitutes a factor militating against review. At the present time, an employer is authorized to discharge employees under a union security agreement only (1) for failure to acquire union membership open to employees upon nondiscriminatory terms and (2) for nonpayment of union dues and initiation fees. Section 8 (a) (3) (A) and (B) of the National Labor Relations Act, as amended, *infra*, pp. 37-38. These reasons aside, no discharge under a union security agreement is permissible, and, in consequence, a discharge for rival union activity carried on at an appropriate time would be discriminatory. But the amended provision is not effective as to closed-shop agreements entered into before its enactment, or, as to closed-shop agreements for not longer than a one-year term entered into after its enactment but before August

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* *National Labor Relations Board* v. *Geraldine Novelty Co.*, 173 F. 2d 14 (C. A. 2); *National Labor Relations Board* v. *American White Cross Laboratories, Inc.*, 160 F. 2d 75 (C. A. 2).

22, 1947, its effective date. Section 102 of the Labor Management Relations Act, *infra*, pp. 40-41. Therefore, the original Section 8 (3) retains its vitality with respect to cases arising before the amendment and with respect to cases arising since the amendment under closed-shop agreements effective after the amendment because continued or entered into by virtue of the saving provision. At the present time, there are pending seventeen active cases of this nature. Three such cases are before the Courts of Appeals awaiting decision or argument, one each before the Seventh Circuit,[7] the Sixth Circuit,[8] and the Third Circuit;[9] three cases are awaiting institution of enforcement proceedings in the Courts of Appeals;[10] three cases are awaiting determination of the employer's position on compliance with the Board's order;[11] two cases are pending before the Board for decision;[12] and six cases are either

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[7] *Matter of Owens-Illinois Glass Company*, 80 N. L. R. B., No. 141.

[8] *Matter of Eaton Mfg. Co.*, 76 N. L. R. B. 261.

[9] *Matter of Public Service Corporation of New Jersey*, 77 N. L. R. B., No. 53.

[10] *Matter of Selig Manufacturing Co., Inc.*, 79 N.L.R.B., No. 155; *Matter of National Electric Products Corporation*, 80 N. L. R. B., No. 151; *Matter of Detroit Gasket & Manufacturing Co.*, 79 N. L. R. B., No. 83

[11] Matter of American Packing Corporation, 82 N.L.R.B., No. 117; *Matter of Hamilton-Scheu-Walsh Shoe Co.*, 80 N. L. R. B., No. 234; *Matter of Interstate Engineering Corp.*, 83 N. L. R. B., No. 16

[12] *Matter of United Engineering Company*, Case No. 20-C-1722; *Matter of Hammond Lumber Co.*, Case No. 21-C-3104.

under investigation, in hearing, or awaiting the trial examiner's intermediate report.[12] Except for these cases, and other discharges which may take place under closed-shop agreements entered into before the enactment of the Labor Management Relations Act, the proviso to the original Section 8 (3) of the National Labor Relations Act has no continuing vitality. The contrariety of the results in the Courts of Appeals thus does not here afford the same compelling reason for granting certiorari which it usually has.

2. Petitioner in No. 694 (Pet. 23-24, 29-30, 61-63), contends that there is no substantial evidence to support the Board's finding, which was sustained by the court below (R. IV, 992), that the employer knew that the discharges of the thirty-seven employees under the closed-shop agreement were requested by the contracting union in reprisal against the employees' activities on behalf of the rival union. This presents no question warranting review. Moreover, as the evidence set forth in the Statement (pp. 3-17, *supra*) shows, the finding is amply sustained.

Petitioner complains that the Board places upon it the burden of making a "bona fide effort to

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[12] *Matter of International Detrola Corp.*, Case No. 7-CA-90; *Matter of Chase Candy Company*, Case No. 14-CA-172; *Matter of Atlantic & Pacific Tea Company*, Case No. 2-CA-349; *Matter of Compressed Air Workers Union, Local 147*, Case No. 2-CB-117; *Matter of E. A. Sparks*, Case No. 20-C-1570; *Matter of Zansmer Foods, Inc.*, Case No. 2-C-6960.

evaluate all the evidence before it" (Pet. in No. 694, 24, 29-30, 62-63). After finding that the employer knew of the C.I.O.'s discriminatory purpose, in answer to the employer's contention that it "could not 'necessarily have deduced' the C.I.O.'s true purpose" (R. I, 79), the Board concluded, as an alternative ground for decision, that the employer "made no bona fide effort to evaluate all the evidence before it when it allegedly decided, despite the C.I.O.'s failure to deny the obvious facts, to believe that the C.I.O. was not acting in reprisal against the complainants because of their anti-C.I.O. activity" (R. I, 79). The Board holds only that the employer may not disregard the plain import of facts of which it is apprised. Surely, it is old law that a person "has no right to shut his eyes or his ears to the inlet of information," and then claim in good faith that he is "without notice."[14]

3. Petitioners in both Nos. 694 and 695 contend that the discharged employees withdrew from membership in the C.I.O., as distinguished from engaging in rival union activity while maintaining membership in the C.I.O., thus justifying their discharge under the closed-shop agreement (Pet. in No. 694, pp. 23, 52; Pet. in No. 695, pp. 8-9, 11-12). The basis for the contention is founded

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[14] *Simmons Creek Coal Company* v. *Doran*, 142 U. S. 417, 437; quoting from the Virginia Court of Appeals in *Burwell's Admr's.* v. *Fauber*, 21 Gratt. 446, 463.

upon the telegrams sent to the employer and the C.I.O. by the four committeemen at the conclusion of the first anti-C.I.O. meeting on July 30, 1945. The telegram to the employer notified it "of action taken by more than 200 employees of Colgate Palmolive Peet Co. all being former members I L W U 1-6 and being more than 50 percent of total employees have withdrawn and severed relations with I L W U-6 as collective bargaining agent." The telegram to the C.I.O. was similar in content. (*Supra*, p. 8.)

The contention is a palpable afterthought. The telegrams could not constitute instruments of withdrawal from the C.I.O., because they did not identify by name the more than 200 employees covered by them. None of the thirty-seven employees selected for discharge were delinquent in their payment of dues to the C.I.O. (R. II, 518). The C.I.O. at no time accepted the telegrams as an effective withdrawal from membership in the C.I.O., and at no time represented to the employer that its request for the discharge of the A.F.L. adherents was based on the telegrams as an act of withdrawal from membership. Its formal representations, contained in its letters to the employer, requested the discharge of named employees because they had been "*suspended* from membership" pending a trial before a C.I.O. tribunal upon charges filed against them (R. III, 846-847, 784-785, 792-793). [Italics supplied.] The C.I.O. can-

not consistently maintain that the employees were not members of the C.I.O., but that the C.I.O. at the same time asserted jurisdiction over them for the purposes of trial (*supra*, pp. 6, 16-17.)

The telegram to the employer speaks of "more than 200 employees" and "more than 50 percent of total employees." The selection of only 37 of these employees for discharge emphasizes that the telegram as an ostensible act of withdrawal from the C.I.O. played no part in the discharge demands. Moreover, the suggested construction glosses over the phrase reading "severed relations with I L W U-6 *as collective bargaining agent.*" [Italics supplied.] This is the key to the interpretation of the telegram and indicates the meaning which was ascribed to it by all, including the employer and the C.I.O. Its purport and intent was to express the desire of a majority of the employees to replace the C.I.O. as bargaining representative. As explained by Committeeman Sherman in his testimony: "It was not the intent of the telegram to segregate individuals as discontinuing affiliations with the C.I.O. The intent of the telegram was that we were discontinuing the bargaining agency, forming another group." (R. II, 399.)

The Board correctly concluded (R. I, 78, n. 8): "As for the complainants' withdrawal from the C.I.O., which would ordinarily entitle the [employer] to discharge them in view of the closed-

shop contract, it will be observed that the C.I.O. did not accept their withdrawals nor is there any evidence that the [employer] discharged them or rejected the reinstatement application of the stewards and the committeemen *for that reason.* On the contrary, the [employer's] answer and evidence show beyond dispute that the [employer] acted because of the complainants' suspension by the C.I.O. pending determination of charges of anti-C.I.O. activity, and that the attempted withdrawals played no part therein."

The effort to imbue the telegrams with significance which they do not possess injects into the proceedings an issue which does not exist. The Board's conclusion of fact does not raise even a close question of substantial evidence, much less that very exceptional showing of error warranting review of the concurrent findings of the Board and the court below.

4. Petitioner in No. 695 contends that in ordering the discharged employees to be reinstated with back pay, the Board abused its discretion (Pet. in No. 695, pp. 8, 9-11; See also Pet. in No. 694, pp. 56-58). For the purposes of this argument, petitioner concedes "that the discharges were in violation of the Act," but it asserts that "irrespective of the merits of the unfair labor practice issue," it would not effectuate the policies of the Act to reinstate with back pay employees who participated in a work stoppage in contravention of

the C.I.O.'s commitment not to engage in a strike during a war, and to support its conclusion it relies on *National Labor Relations Board* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240; *National Labor Relations Board* v. *Sands Mfg. Co.*, 306 U. S. 332; and *United Biscuit Co.* v. *National Labor Relations Board*, 128 F. 2d 771 (C. A. 7).

In *Fansteel*, the employees were discharged, not for lawful union activity, but for tortious conduct; in *Sands*, the employees were discharged, not for lawful union activity, but for breach of contract; in *United Biscuit*, the employees were replaced during an unfair labor practice strike without the right of reinstatement with back pay, not for lawful union activity, but for breach of contract; here, by hypothesis, the employees were discharged, not for asserted misfeasance, but for lawful union activity. But no case holds that an otherwise discriminatory discharge is outside of the protection of the National Labor Relations Act because of misconduct disassociated from the reason for the discharge.

Analysis of petitioner's position discloses its extremity. It would deny reinstatement with back pay to (1) the five plant stewards, (2) the four committeemen, and (3) the twenty-eight additional employees. The five plant stewards were discharged before any work stoppage was even contemplated. The work stoppage was planned in protest against the discriminatory discharge of

the five stewards. At the conference with the employer seeking the reinstatement of the five stewards, the four committeemen were ordered discharged by the C.I.O. It was not until the C.I.O. acted in reprisal against the five stewards and the four committeemen that the work stoppage took place. Thus it is plain that if the C.I.O. were concerned with avoiding the work stoppage *qua* work stoppage the simple expedient would have been to permit the reinstatement of the stewards who had done no more than exercise their legal right to seek a change of representatives. As to the discharge of the *twenty-eight* additional employees one month after their participation in the work stoppage in which most of the *313* employees partook, their selection for discharge cannot for a moment be attributed to a belated desire by the C.I.O. to vindicate a breach of the no-strike pledge which it had itself provoked. If the C.I.O. were interested in avoiding interruptions to war work, it would not itself have caused the permanent removal of thirty-seven employees and unsuccessfully have attempted the removal of seventy employees. Indeed, in refusing to accede to the C.I.O.'s request on August 30 to discharge the seventy employees, the employer's Labor Relations Director Wood himself stated to the C.I.O. official: "This thing has gone too far. You are getting too many people involved here. Why, the first thing you know, if this keeps on, we will be shut down." (*supra,* p. 13.)

But the conclusive consideration here is that Congress itself had made clear that engaging in a war-time strike does not deprive employees of the benefits of the National Labor Relations Act. Section 8 of the War Labor Disputes Act [15] precluded a war-time strike except after exhaustion of the procedure therein specified. Violation of Section 8, however, did not affect the employee's protection under the National Labor Relations Act, as the Court of Appeals for the Sixth Circuit held in *Hamilton* v. *National Labor Relations Board,* 160 F. 2d 465, 471 (C. A. 6), certiorari denied *sub nom. Kalamazoo Stationery Co.* v. *National Labor Relations Board,* 332 U. S. 762:

> But it does not follow that a violation of Section 8 of the War Labor Disputes Act deprives an employee of his rights under the National Labor Relations Act. There is no provision in the War Labor Disputes Act to that effect. Section 10 of the National Labor Relations Act specifically recognizes the right of the employee to strike. It deals with employment generally, not merely war production. The War Labor Disputes Act is limited to war production and is not an attempt to amend or modify the National Labor Relations Act. Its legislative history shows that it was not intended to curtail in any way the rights and protection accorded employees under the National Labor Relations Act. The Act as originally passed in the House provided that violators should forfeit their rights under

[15] 57 Stat. 163, 50 U. S. C. App. 1501.

> the National Labor Relations Act. This provision was not approved by the Senate and the revised bill which later became the law did not contain such a penalty. In the debates which followed submission of the Conference Committee Report it was made clear employees' rights under the National Labor Relations Act were not affected. See 89 Cong. Rec. 5304, 5305, 5326, 5327, 5382, 5392, 5730, 5732, 5733; H. Rep. No. 531, 78th Cong., 1st Sess., pp. 5, 9. With this legislative history before us we can not give to the Act the construction contended for by the respondent.

Certainly the private policy of a labor organization, unctuously invoked in the circumstances of this case, does not attain to greater dignity than the national policy declared by Congress. Compare, *Giboney* v. *Empire Storage & Ice Co.*, No. 182, this Term, decided April 4, 1949, slip op., pp. 4, 7.

5. Petitioner in No. 694 contends that in refusing to give effect to the closed-shop contract and in ordering the reinstatement with back pay of the discriminatorily discharged employees, the Board deprived the employer and the contracting union of property without due process of law (Pet. in No. 694, p. 24). This presents no substantial question of constitutional law. If the Board's interpretation of the proviso to Section 8 (3) of the Act is proper, its constitutionality rests on the same basis as the other parts of Section 8 (3). "The Board's order does not violate the Fifth

Amendment. * * * in the exercise of the commerce power, Congress may impose upon contractual relationships reasonable regulations calculated to protect commerce against threatened industrial strife. *N. L. R. B.* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 48. The Board's order there sustained required the reinstatement of the discharged employes." *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, 347. See also, *Lincoln Federal Labor Union* v. *Northwestern Iron and Metal Co.*, 335 U. S. 525; *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177, 187.

6. Petitioner in No. 694 (Pet. 24, 29, 58-60) also contends that the court below, in affirming the Board's findings of fact as supported by substantial evidence, failed to review the record *as a whole* as required by Section 10 (f) of the National Labor Relations Act, as amended, and Section 10 (e) of the Administrative Procedure Act.[16] The decision below will be scanned in vain for any intimation by the court that it did not consider the record as a whole in reaching its conclusion, or that the court believed that review of isolated portions of the record without regard to competing matter sufficed. Indeed, petitioner imputes to the court below a view of its function which it rejected long before the enactment of the Administrative Procedure Act or the amendment of the National

[16] 60 Stat. 237, 5 U. S. C., § 1001, *et seq.*

Labor Relations Act. In *National Labor Relations Board* v. *Union Pacific Stages, Inc.*, 99 F. 2d 153, 177 (C. A. 9), the court below stated:

> But the courts have not construed this language [of the Act] as compelling the acceptance of findings arrived at by accepting part of the evidence and totally disregarding other convincing evidence.

Nor is petitioner's contention that the court below failed to decide all relevant questions of law better taken (Pet. in No. 694, pp. 24, 29, 61). Section 10 (e) of the Administrative Procedure Act provides that "So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law . . ." But this does not mean that the reviewing court is required to discuss every question of law presented, however far-fetched or tenuous, in its written opinion.

As to the specific questions of law asserted to be unanswered by the court below, petitioner states that they are "whether the Board could hold that the C.I.O.'s lawful action in disciplining its members became unlawful because of a state of mind, and whether [employer] could refuse to perform a lawful contract because it knew that such performance might incidentally assist the C.I.O. to evade the law" (Pet. in No. 694, pp. 61, 55-56). Insofar as there is substance to these contentions, they constitute no more than a repetition in different words of the main attack upon the Board's

interpretation of Section 8 (3) of the Act. In approving the Board's order, the court below necessarily rejected these contentions, and accordingly, petitioner has the court's decision on the questions of law presented.

CONCLUSION

For the reasons stated, we neither oppose nor consent to the grant of the petition for a writ of certiorari in No. 694 limited to the first question set forth at page 2, *supra*. However, with respect to the other questions raised in No. 694 and with respect to all questions raised in No. 695, we urge that the petitions for writs of certiorari should be denied.

Respectfully submitted.

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May, 1949

APPENDIX

1. The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. 151 *et seq.*), are as follows:

* * * * *

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

Sec. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701-712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective

bargaining unit covered by such agreement when made.

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

* * * * *

Sec. 10. * * *

(c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act.

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order * * * The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * *

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. * * * Upon such filing, the

court shall proceed in the same manner as in the case of an application by the Board under subsection (e), * * * and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.

* * * * *

2. The relevant provisions of the Labor Management Relations Act, 1947 (61 Stat. 136, 29 U. S. C., Supp. I, 141, *et seq.*) are as follows:

* * * * *

Sec. 101. The National Labor Relations Act is hereby amended to read as follows:

* * * * *

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

Sec. 8 (a). It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made; and (ii) if, following the most recent election held as provided in section 9 (e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

Sec. 10 * * *

* * * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided*, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: * * * If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. * * *

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for

the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order * * * The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

(f) If any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. * * * Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) * * *; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

* * * * * *

Sec. 102. No provision of this title shall be deemed to make an unfair labor practice any act which was performed prior to the date of the enactment of this Act which did not constitute an unfair labor practice prior thereto, and the provisions of section 8 (a) (3) and sections 8 (b) (2) of the National Labor Relations Act as amended by this title shall not make an unfair labor practice the performance of any obligation under a collective-bargaining agreement entered into

prior to the date of the enactment of this Act, or (in the case of an agreement for a period of not more than one year) entered into on or after such date of enactment, but prior to the effective date of this title, if the performance of such obligation would not have constituted an unfair labor practice under section 8 (3) of the National Labor Relations Act prior to the effective date of this title, unless such agreement was renewed or extended subsequent thereto.

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